IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2006 Session

WASTE MANAGEMENT, INC. OF TENNESSEE v. SOLID WASTE REGION BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY ET AL.

Appeal from the Chancery Court for Davidson County
No. 04-2501-II Carol L. McCoy, Chancellor

No. M2005-01197-COA-R3-CV - Filed April 11, 2007

This appeal involves the efforts of the operator of a private construction and demolition waste landfill to obtain approval to expand its landfill. The board overseeing the local government's solid waste management plan denied the operator's application after the area residents objected. The operator then filed a petition for review in the Chancery Court for Davidson County. The trial court permitted the area residents to intervene and, based on the record of the board's proceedings, determined that the board's decision was legally unsound and was not supported by the evidence. The regulatory board and the area residents have appealed. We have determined that the board's denial of the permit to expand the private landfill was clear error, and, therefore, we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Thomas G. Cross, Nashville, Tennessee, for the appellant, Solid Waste Region Board of the Metropolitan Government of Nashville and Davidson County.

James R. Tomkins, Nashville, Tennessee, for the appellants, Chris Utley, Brenda Gilmore, Matthew Walker, Arthur Harris, Frances Utley, Johniene Thomas, and Kenneth Caine.

John P. Williams and Thomas V. White, Nashville, Tennessee, for the appellee, Waste Management, Inc. of Tennessee.

OPINION

I.

The Solid Waste Management Act of 1991, Tenn. Code Ann. §§ 68-211-801 through -874 (2006), establishes a comprehensive program for managing solid waste in Tennessee. The Act

divides the state into municipal solid waste planning districts,[1] and the solid waste disposal activities in each district are managed by a board.[2] These boards are empowered to create and maintain a plan for managing the disposal of solid waste within the district.[3] Any entity desiring to operate a solid waste disposal facility must first obtain a permit from the board overseeing the disposal of solid waste in the district in which the facility will be located. The boards may deny an application either to build or to enlarge a landfill only if the proposed landfill project is inconsistent with the region's solid waste disposal plan.[4]

Waste Management, Inc. of Tennessee (Waste Management) currently owns a 165-acre tract of property on Hydes Ferry Pike in the Bordeaux area of Davidson County. Sometime prior to 1991, either Waste Management or its predecessor-in-interest constructed and began operating the Southern Services Landfill. The 71.5 acre landfill sat on two parcels separated by a strip of property where power lines were located. Because the landfill accepts only commercial construction and demolition waste, as well as landscaping and land clearing waste, it is classified as a Class III/IV landfill.[5] It is the only Class IV landfill located in Davidson County.

In 1992, the Metropolitan Council, acting pursuant to its authority under the Solid Waste Management Act of 1991, created the Metro Solid Waste Region Board (Board). In 1994, the Board prepared a solid waste management plan for the Metropolitan Nashville and Davidson County region that approved the continued use of the existing Southern Services Landfill. When the Board updated its plan in 1999, it again approved the continued use of the Southern Services Landfill.

The power lines bifurcating the Southern Services Landfill were eventually relocated. In March 2003, Waste Management sought the Board's permission to expand the existing landfill to the seven acres of property where the power lines had been located. The Board approved the application unanimously on May 13, 2003 and informed the Tennessee Department of Environment and Conservation (TDEC) of its action.[6] Thereafter, Waste Management proceeded to clear the other required regulatory hurdles.[7]

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[1] Tenn. Code Ann. § 68-211-811.

[2] Tenn. Code Ann. § 68-211-813(b)(1).

[3] Tenn. Code Ann. §§ 68-211-813(c), -814, -815.

[4] Tenn. Code Ann. § 68-211-814(b)(2)(B).

[5] Both Class III and Class IV landfills collect demolition/construction waste and shredded automotive tires. In addition, Class III landfills collect farming wastes and landscaping and land clearing wastes. Tenn. Comp. R. & Regs. 1200-1-7-.01(3)(c)-(d)(2002).

[6] *See* Tenn. Code Ann. § 68-211-814(b)(2)(A).

[7] Waste Management submitted its application to TDEC, which reviewed the application, conducted public hearings, and approved the application on May 17, 2004. Waste Management's expansion was subsequently approved by TDEC's Division of Water Pollution Control, which ensured that the expansion of the landfill would result in a net (continued...)

Public opposition to the expansion of the Southern Services Landfill began to gain traction in early 2004 amid allegations that the notice of the Board's March 2003 meeting did not comply with the Sunshine Law.[8] The Board allowed residents to express their concerns about Waste Management's plans at its April 21, 2004 meeting but decided not to reconsider its earlier decision to approve the expansion of the landfill. Following this meeting, the Board again informed TDEC that it approved the proposed expansion of the Southern Services Landfill.

Shortly after TDEC approved Waste Management's expansion plans, a group of concerned citizens formed a nonprofit corporation named Bordeaux Beautiful, Inc. and filed suit in the Chancery Court for Davidson County seeking to enjoin the expansion of the landfill. On June 4, 2004, the court filed an order declaring that the Board's March 2003 meeting violated the Sunshine Law and directing the Board to hold another meeting to consider Waste Management's application.[9] The court did not rule on the merits of Waste Management's permit application.

The Board considered Waste Management's application for the third time on July 27, 2004. At this meeting, the Board reversed course and rejected the application. In a subsequent letter to TDEC,[10] the Board explained that its decision was based on the following four considerations:

1) Per page 11-5 of the 1994 Solid Waste plan, the company did not find a replacement site by 1997.
2) Per page 11-5 of the 1994 Solid Waste plan, the Metropolitan Government did not pursue a replacement site.
3) The operations of the applicant do not include any recycling or sorting as mandated by the plan.
4) Approval of the application would violate a conservation easement into which the company previously entered.

Waste Management filed a petition for judicial review in the Chancery Court for Davidson County. The trial court allowed the individual members of Bordeaux Beautiful, Inc. to intervene. On April 7, 2005, the trial court filed a memorandum and order concluding that the Board's rejection of Waste Management's application based on the parties' failure to locate a replacement site was unsupported by the evidence. The trial court also concluded that the Board's reasoning regarding the recycling mandates and the conservation easement on Waste Management's property were legally

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[7](...continued)
gain in wetland acreage on Waste Management's property. The U.S. Army Corps of Engineers also approved the landfill expansion.

[8]Tenn. Code Ann. § 8-44-101 to -201 (2002 and Supp. 2006), commonly referred to as the Sunshine Law, requires adequate notice of public meetings. Tenn. Code Ann. § 8-44-103. The Board is bound pursuant to Tenn. Code Ann. § 68-211-814(b)(2)(E) to act in accordance with the Sunshine Law.

[9]*Bordeaux Beautiful, Inc. v. Metro. Gov't*, No. 04-1513-III (Davidson County Chan. Order filed June 4, 2004).

[10]Tenn. Code Ann. § 68-211-814(b)(2)(B) provides that the Board must "document in writing the specific grounds on which [a rejected] application is inconsistent with [a region's waste management plan]."

unsound. Accordingly, the trial court reinstated the Board's initial approval of Waste Management's permit. The Board and several of the intervenors have appealed.[11]

II.
THE STANDARD OF REVIEW

This case comes to us pursuant to Tenn. Code Ann. § 68-211-814(b)(2)(D) which incorporates the judicial review provisions in the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -325 (2005).[12] Accordingly, both the trial and the appellate courts use the standard of review called for in Tenn. Code Ann. § 4-5-322(h) to review the actions of boards administering the Solid Waste Management Act of 1991. *Mosley v. Tenn. Dep't of Commerce & Ins.*, 167 S.W.3d 308, 316 (Tenn. Ct. App. 2004); *Lien v. Metro. Gov't*, 117 S.W.3d 753, 755 (Tenn. Ct. App. 2003); *Ware v. Greene*, 984 S.W.2d 610, 614 (Tenn. Ct. App. 1998).

Neither the Board's jurisdiction nor its procedures have been challenged in this case, and the facts are undisputed. Therefore, our review is guided by Tenn. Code Ann. § 4-5-322(h)(4), under which courts may modify or overturn a decision by an administrative agency that is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." This standard of review requires the court to determine whether the administrative agency made a clear error in judgment. *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 110-11 (Tenn. Ct. App. 1993). An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, *State ex rel Nixon v. McCanless*, 176 Tenn. 352, 354, 141 S.W.2d 885, 886 (1940), or that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d at 111.

The construction of administrative rules and regulations is a question of law. *Cape Fear Paging Co. v. Huddleston*, 937 S.W.2d 787, 788 (Tenn. 1996); *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993). The courts will give great weight to an agency's interpretation of its own rules, *Jackson Express, Inc. v. Tenn. Pub. Serv. Comm'n*, 679 S.W.2d 942, 945 (Tenn. 1984); *Jones v. Bureau of Tenncare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002), especially an interpretation that has been consistently followed for many years without challenge, *SunTrust Bank v. Johnson*, 46 S.W.3d 216, 226 (Tenn. Ct. App. 2000). However, the courts will decline to adopt an agency's interpretation of a rule if the interpretation (1) is plainly erroneous, (2) is inconsistent with the plain language of the rule, or (3) has no reasonable basis in law. *Jackson Express, Inc. v. State Pub. Serv. Comm'n*, 679 S.W.2d 942, 945 (Tenn. 1984); *Cawthron v. Scott*, 217 Tenn. 668, 674, 400 S.W.2d 240, 242 (1966); *Envt'l Defense Fund, Inc. v. Tenn. Water Quality Control Bd.*, 660 S.W.2d 776, 781 (Tenn. Ct. App. 1983).

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[11] Intervenors Patsy Christman, Melvin Ferguson, and Vanna Ferguson have not appealed.

[12] The standard of review for appeals from board decisions regarding the expansion of a landfill differ from the standard of review for appeals from a county legislative body's decision to either approve or deny an application to construct a new landfill. *Compare* Tenn. Code Ann. § 68-211-814(b)(2)(D) *with* Tenn. Code Ann. § 68-211-704(c) (2006); *see also Tenn. Waste Movers, Inc. v. Loudon County*, 160 S.W.3d 517, 519-21 (Tenn. 2005).

The familiar standard of review in Tenn. R. App. P. 13(d) does not apply to appeals governed by the Uniform Administrative Procedures Act. *See Metro. Gov't v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977) (stating that the drafters of the Uniform Administrative Procedures Act did not intend that there be a broad, de novo appellate review of a trial court's disposition of a petition for review). Instead, the appellate courts must apply the same standard of review employed by the trial court, *CF Indus. v. Tenn. Pub. Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn. 1980); *Terminix Int'l Co. v. Tenn. Dep't of Labor*, 77 S.W.3d 185, 191 (Tenn. Ct. App. 2001), and must determine whether the trial court properly applied the standard of review in Tenn. Code Ann. § 4-5-322(h). *Jones v. Bureau of Tenncare*, 94 S.W.3d 495, 501 (Tenn. 2002); *Papachristou v. Univ. of Tenn.*, 29 S.W.3d 487, 490 (Tenn. 2000). The trial court's decisions in cases of this sort are not presumed to be correct. *ANR Pipeline Co. v. Tenn. Bd. of Equalization*, No. M2001-01098-COA-R12-CV, 2002 WL 31840689, at *1 (Tenn. Ct. App. Dec. 19, 2002), *perm. app. denied*, (Tenn. June 30, 2003). [13]

III.
THE EXPANSION'S CONFORMANCE WITH THE WASTE MANAGEMENT PLAN

Because the Board may deny a proposed expansion of a landfill only if it is inconsistent with the region's waste management plan, Tenn. Code Ann. § 68-211-814(b)(2)(B), the pivotal issues in this case involve whether the proposed expansion of Waste Management's landfill is inconsistent with the Board's solid waste management plan for the Metropolitan Nashville and Davidson County region. The Board and the intervenors argue that it is; while Waste Management insists that it is not. Like the trial court, we have concluded that Waste Management has the better argument.

A.
The Solid Waste Management Plans

The solid waste management plan that the Board adopted in 1994 contained the following discussion regarding the Southern Services Landfill:

> The Metro Solid Waste Region Board has voted to continue the use of the existing Southern Services Class IV landfill, to allow the permitting of an expansion of that landfill and, to the extent needed, allow the development of additional Class IV landfills within the Metro Region.
>
> <u>Schedule:</u>
> Since this is a private facility, implementation schedules are subject to the desires of the owner. From conversations with the owner, expansion plans for the existing facility are under consideration. At

[13] In 2004, the Tennessee General Assembly enacted legislation that had the effect of reversing the court's holding that pipelines and surface equipment should be treated as personal property for the purposes of ad valorem taxation. *See* Act of May 18, 2004, ch. 719, 2004 Tenn. Pub. Act 1652 *as recognized in Colonial Pipeline Co. v. Morgan*, 474 F.3d 211, 214-15 (6th Cir. 2007).

> the present disposal rate, it has been estimated that this facility has seven more years of capacity. It is anticipated that prior to this time a replacement site will be commercially developed. If not, then Metro government officials will pursue development of a replacement facility by 1997. It has been stated that such a facility would be located on a parcel of land in Davidson County known as the Kodak site.

In 1999, the Board commissioned a "Five-Year Update" of the 1994 solid waste management plan. The updated plan quoted paragraphs from the 1994 plan's executive summary and added several new paragraphs explaining the differences between the two plans. With regard to Class IV landfills, the 1999 plan contained the following:

> Construction and Demolition Landfills: The Plan continues the use of the existing Southern Services Class IV landfill, allows permitting of an expansion of that landfill and, to the extent needed, allows the development of additional Class IV landfill [sic] within the Region, provided such sites are approved by the Metro Council and permitted by the State of Tennessee Division of Solid Waste Management.[14]
>
> Southern Services continues to be the only privately owned and operated construction and demolition landfill in Davidson County. A significant portion of the annual per capita reduction each year for the Region's waste stream has been attained at this facility. The Board has been [sic] this percentage far exceeds the amount anticipated in the original Plan. The Board again hopes to be able to reduce that percentage in the future by the implementation of Economic Flow Control and the recycling and composting programs that can then be funded to achieve this goal.

B.
The Replacement Landfill Sites

The Board asserts that Waste Management's proposed expansion of the Southern Services Landfill is inconsistent with the solid waste management plan because it reflects the failure of both Waste Management and the Metropolitan Government to locate alternative sites for landfills that will accept commercial construction and demolition waste. This argument is without merit because neither the 1994 plan nor the 1999 plan places an affirmative obligation on Waste Management to locate alternative landfill sites.

The 1994 plan merely "anticipated" that another landfill for the disposal of commercial construction and demolition waste would be "commercially developed." This terse sentence, written

[14] The preceding paragraph was the quote from the 1994 Executive Summary.

in the passive voice, provides no reasonable basis for imposing on Waste Management the obligation to find a replacement landfill. In any event, the 1999 plan made absolutely no mention of locating and opening a replacement landfill site.[15] While we are required to defer to the Board's interpretation of its own plan, *see Exxon Corp. v. Metro. Gov't*, 72 S.W.3d at 641, the Board's determination that its plans required either Waste Management or Metropolitan Government to find a replacement landfill site is clearly erroneous.

C.
The Mandatory Recycling Requirement

The Board and the intervenors next contend that Waste Management's application failed to comply with the 1994 plan's mandatory recycling provisions. Even though no portion of the 1994 plan or the 1999 plan addressing recycling was included in the record, the trial court took judicial notice of a passage from the 1994 plan which discussed recycling objectives.[16] The trial court determined, as do we, that the recycling language, couched in terms of goals, is directed only toward an anticipated mixed waste processing facility designed to divert waste from disposal into a Class I landfill. There is no connection between the recycling language in the plans and any responsibilities on the part of Class IV landfills in general or Waste Management in particular. The Board's solid waste management plan does not subject Class IV landfills to recycling requirements, and the Board's finding to the contrary is an unreasonable and, therefore, arbitrary conclusion.

D.
Limitation on the Number of Expansions

The intervenors also argue that the Board properly denied Waste Management's request because the solid waste management plan limits the number of expansions of the Southern Services Landfill. Pointing to the phrase "permitting an expansion" found in an intra-agency memorandum written in 1999, they insist that the use of a singular article and noun reflects the Board's intention to permit one and only one expansion of the Southern Services Landfill. We find that the intervenors have read too much into this memorandum.

The 1999 memorandum analyzes the need for a new landfill and mentions that the Southern Services Landfill was approved for expansion in 1996. However, it does not indicate that this expansion ever occurred. In fact, its final paragraph references the continued expansion potential of the Southern Services landfill.

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[15] The parties are in apparent agreement that the management and operation of the Kodak site referenced as a possible landfill site in the 1994 plan has since been transferred to the Metro Parks Department.

[16] The appellants filed a motion to supplement the record on appeal with additional portions of the 1994 plan and the 1999 plan. We denied the motion but agreed to take judicial notice of the recycling plans to the same extent that the trial court did. *Waste Management, Inc., of Tenn. v. Solid Waste Region Bd.*, No. M2005-01197-COA-R3-CV, (Tenn. Ct. App. order filed July 29, 2005).

The record does not reveal the connection between the Board and the 1999 memorandum. As far as the record shows, it was presented to the Board for the first time during the 2004 hearing. Thus, we find no legal basis to relate the memorandum to the Board's solid waste management plan. Had the Board believed that its 1994 plan limited the number of expansions of the Southern Services Landfill, it would have pointed out in its 1999 plan that Waste Management had expanded the landfill in 1996 and that no further expansions would be permitted. Instead of this sort of language, the 1999 plan quotes the language from the 1994 plan allowing expansion of the landfill without modification or revision.

E.
Violation of the Declaration of Restriction

The intervenors, asserting an argument abandoned by the Board, also insist that approving Waste Management's application would violate a declaration of restriction entered into between TDEC and Waste Management's predecessors in title. This restriction was intended to protect wetlands on the property, and it explicitly permitted TDEC to waive or terminate the agreement at any time. Waste Management responds that the declaration of restriction has no bearing on whether the expansion of the landfill is consistent with the solid waste management plan and that TDEC necessarily waived the restriction when it granted Waste Management a permit to expand the landfill. We agree that the landfill's compliance with the declaration of restriction is an issue separate and distinct from its consistency with the Board's solid waste management plan.

It is undisputed that Waste Management is bound by the declaration of restriction entered into with TDEC. Similarly, it is undisputed that TDEC may waive the restriction. These facts are simply irrelevant, however, to the relationship between Waste Management's landfill expansion and the Board's solid waste management plan. The trial court found that the Board's reasoning in that regard was unsound, and we agree with the trial court's finding.[17] Because we find that the Board's decision to deny the permit based on a potential violation of the declaration of restriction was arbitrary and capricious, we need not address the issue of whether TDEC's issuance of a permit constituted a waiver of the restriction.

F.
The Necessity, Compatibility, or Desirability of the Expansion

As a final matter, the intervenors argue for the first time on appeal that Waste Management's proposed expansion of the Southern Services Landfill is "not needed" and is "not compatible or desirable." We need not discuss these arguments at length for two reasons. First, they cannot be asserted in this court because they were not raised in the trial court. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991); *Williamson County Broad. Co. v. Intermedia Partners*, 987 S.W.2d 550, 553 (Tenn. Ct. App. 1998); *Sweeney v. State Dep't of Transp.*, 744

[17] On appeal, the Intervenors asked this court to consider as a post-judgment fact a TDEC official's letter to one of the intervenors regarding the declaration of restrictions. We denied that motion. *Waste Management, Inc. of Tenn. v. Solid Waste Region Bd.*, No. M2005-01197-COA-R3-CV (Tenn. Ct. App. order filed July 29, 2005).

S.W.2d 905, 906 (Tenn. Ct. App. 1987). Second, Waste Management's request to expand the Southern Services Landfill may be denied only if it is inconsistent with the Board's waste management plan -- necessity, compatibility, or desirability notwithstanding.

IV.

The judgment is affirmed, and the case is remanded to the trial court for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal to the Metropolitan Government of Nashville and Davidson County.

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WILLIAM C. KOCH, JR., P.J., M.S.